IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Smt. Shanti Devi and others
vs.
Smt. Kanchan Devi and another.

S.B.CIVIL SECOND APPEAL NO.471/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 25.10.2005 PASSED BY SHRI KAILASH CHANDRA SHARMA, ADDITIONAL DISTRICT JUDGE NO.1, BIKANER IN CIVIL APPEAL NO.5-A/2005.

DATE OF JUDGMENT ::: 9.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. SL Jain, for the appellants.
Mr. SD Vyas, for the respondents.

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BY THE COURT:

Heard learned counsel for the parties and perused the record.

The appellants/defendants/tenants are aggrieved against the judgment of the appellate court dated 25.10.2005.

Brief facts of the case are that the plaintiff filed suit for eviction of the defendants no.1 to 4/appellants and respondent no.2 with the allegation that the suit property was in tenancy of one Narayan Das, who alone was doing the business in suit shop and was paying the rent. He died and at the time of his death, none of his family members were doing the business in the suit shop and, therefore, as per the definition given in Section 3(iv) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950'), none of the family members became tenant. The plaintiff also alleged that the defendants committed default in payment of rent, materially altered the premises and sub-let the suit premises to the defendant no.4 and that the suit shop is required for the plaintiff.

The trial court dismissed the suit of the plaintiff. The plaintiff's appeal against the said judgment of the trial court was allowed by the first appellate court. The first appellate court also held that in fact, the plaintiff's specific case was that none of the defendants became tenants after death of Narayan Das and they are not protected by the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950'). The first appellate court after considering the pleadings of the parties and admissions of the defendants – wife and son of deceased Narayan Das held that the defendants specifically admitted that at the time of

death of Narayan Das, they were not doing the business with Narayan Das in the suit shop, therefore, they are not tenant as per the definition of tenant given in the Act of 1950. Accordingly, the first appellate court set aside the judgment and decree of the trial court and decreed the suit of the plaintiff for eviction of tenant.

Learned counsel for the appellant vehemently submitted that the landlord herself accepted the defendants no.1 and 2 as tenant which is clear from the facts available on record. Narayan Das died in the year 1990 and thereafter, the appellants continued their business in the suit shop. They paid the rent to the landlord/plaintiff and the landlord increased the rent from time to time, lastly rent was paid upto 31.12.1994 and, therefore, it is clear that the appellants are tenants in the suit. It is also submitted that the rent receipt was issued in the name of Rajhans Restaurant which was proprietorship firm of Narayan Das and in the same name, the rent was accepted by the plaintiff. In view of the above facts, the plaintiff herself accepted the defendants no.1, 2 and 3 as her tenant. The plaintiff filed the suit for eviction treating the defendants no.1 to 3 as tenants by valuing the suit according to valuation for filing the suit against the tenants for eviction.

Learned counsel for the appellants also submitted that the first appellate court committed serious error in framing the issue which was never raised by the plaintiff

in the memo of appeal before the first appellate court and further committed error of law by not giving an opportunity to the tenants to lead the evidence on the newly framed issue. It is also submitted that thereby the case of the appellants have been seriously prejudiced.

I have considered the submissions of the learned counsel for the appellant and perused the facts of the case also.

It is clear from even the facts mentioned in the judgments of the two courts below that the plaintiff in her plaint very specifically pleaded that Narayan Das alone was tenant in the suit shop. He was doing business alone till he died. At the time of his death, none of the family members were doing business with him. This fact was contested by the defendants by filing written statement. The defendants no.1 and 2 stated that the suit property was let out to Narayan Das and he was doing business in the suit shop. The defendants pleaded that the defendant no.1 was doing business during her husband's life time with him. She also pleaded that after the death of Narayan Das, she used to pay rent which was accepted by the landlord, therefore, the defendants were fully aware of the grounds taken by the plaintiff in the plaint. The defendants no.1 and 2 both appeared in the witness box and very specifically admitted the case set up by the plaintiff and contradicting their own defence by admitting on oath that at the time of death of Narayan das, neither defendant no.1

nor the defendant no.2 were doing business in the suit shop. The allegations in the plaint was that the suit shop has been sublet to Radha Kishan who, according to the defendants, is servant in the restaurant. In view of the above, if the first appellate court accepted the statement of the defendants themselves, the appellate court has not committed any error of law because the appellate court has full jurisdiction to decide the issue which has not been decided by the trial court.

Mere acceptance of rent from the legal heirs of deceased tenant by landlord cannot itself constitute tenancy unless there is intention to create tenancy for which the defendants have not taken any specific ground in their written statement, therefore, the first appellate court could have looked into only the evidence which was relevant for deciding the controversy between the parties. In view of the above, no prejudice has been caused to the defendants if their admission was accepted and that admission is in support of the plaintiff's case and contrary to their own plea taken in the written statement.

In view of the above, the appellate court has not committed any error in decreeing the suit and has not committed any error by not framing the issue. There was no necessity of giving any more opportunity to the defendants in view of their specific admission in the present case itself. It is irrelevant that the ground was not taken specifically in the memo of appeal by the landlord as in

the peculiar facts of the case, the plea is having foundation in the suit.

Accordingly, I do not find that any substantial question of law arises in this appeal, therefore, this appeal deserves to be dismissed.

At this stage, learned counsel for the appellants prayed that sufficient time may be granted to vacate the suit premises because the appellant will have to make alternative arrangement.

Looking to the totality of the facts, this Court deems that the appellants be granted one year's time to vacate the suit shop.

Therefore, it is ordered that in case, the appellants furnish a written undertaking before the trial court within a period of one month from today that they shall hand over the vacant possession to the landlord by or before 31.5.2007 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.6.2007. The appellants shall also deposit the rent month by month by 15th day of each succeeding month of their tenancy in the trial court.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya